

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>HAROLD PETERS</b>	)	
Claimant	)	
VS.	)	
	)	
<b>ROMACK SERVICES, INC., d/b/a BURGER KING</b>	)	Docket No. 1,011,032
Respondent	)	
AND	)	
	)	
<b>ALEA NORTH AMERICAN INS. CO.</b>	)	
<b>COMMERCE &amp; INDUSTRY INS. CO.</b>	)	
<b>ACE AMERICAN INS. CO.</b>	)	
<b>LIBERTY MUTUAL FIRE INS. CO.</b>	)	
Insurance Carriers	)	

**ORDER**

Claimant appeals the August 26, 2004 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was denied benefits by the ALJ, who determined that claimant failed to prove that his ongoing pathology was related to his employment activities based upon the opinion of the independent medical examiner, Anthony G.A. Pollock, M.D.

**ISSUES**

- (1) Did claimant suffer accidental injury arising out of and in the course of his employment?
- (2) Is claimant entitled to temporary total disability compensation?
- (3) Should medical treatment be granted with Lynn A. Curtis, M.D.?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant was hired by respondent in October 1997 to manage Burger King restaurants at various locations. Claimant worked at several locations, working long hours. Claimant testified he first began noticing problems in his low back in June of 1998 after the first new restaurant had been open for approximately three months. He had severe stiffness and pain. Claimant testified that he regularly worked double shifts and was on his feet on a regular basis. His job involved lifting, cleaning, sweeping and mopping, as well as unloading shipments of supplies.

Claimant was provided medical treatment with numerous health care providers. Among those health care providers was Rick Huskey, D.C., a chiropractor from Tulsa, Oklahoma. Dr. Huskey was advised that claimant had right hip and leg pain for 15 to 20 years, and that claimant had been involved in a fall several years ago and a motor vehicle accident, both of which caused increased pain. Claimant advised Dr. Huskey that walking, standing and sitting all aggravated his condition. Claimant's history was even more significant in that, in 1985, after working in an auto repair shop, he was forced to leave that business because of exacerbating pain, generalized muscle aches and generalized joint pain. Claimant's condition did improve somewhat after he stopped working on cars. He was early on diagnosed with fibromyalgia, and the medical reports also discuss a slip and fall injury in 1979.

Claimant has been treated with chiropractic manipulations on several occasions, has received several injections in his SI joint, which provided only temporary relief, and has been placed on numerous pain medications by the various health care providers. Findings on physical examination have generally been mild, with claimant able to walk on his heels and toes, and squat and return to a standing position, although occasionally with assistance. Claimant has been described as somewhat hysterical, with significant pain behavior, including grimacing, withdrawal and gasping.

An MRI done in 1998 indicated only mild degeneration at L3-4, which C. Scott Anthony, D.O., of Tulsa Pain Consultants, indicated was not contributing to claimant's overall pain condition. Dr. Anthony reported that claimant was suffering from chronic lumbosacral back pain, with a likely component of sacroiliac joint disease. However, Dr. Anthony did not believe claimant had fibromyalgia, as had earlier been diagnosed.

Lynn A. Curtis, M.D., from Disability Consulting, P.A., in Topeka, Kansas, examined claimant on two occasions. Dr. Curtis diagnosed chronic pain syndrome, noting in his February 24, 2004 report that claimant may be suffering from sacroiliac joint pain, which can cause pain in the area of the pelvis. Dr. Curtis also noted that claimant had become dependent upon narcotics, which were limiting his activities. He advised that claimant enter into either an outpatient or inpatient therapy program with the express goal of weaning claimant off the narcotics.

Claimant was referred to Philip R. Mills, M.D., board certified in physical medicine and rehabilitation, on June 9, 2003. Dr. Mills found claimant's activities during physical examination to be somewhat hysterical, diagnosing only mild tenderness at the LS paraspinous level. He ultimately concluded claimant suffered from chronic pain syndrome, but was unable to determine the cause. He recommended a functional capacity evaluation (FCE) in order to determine what, if any, restrictions claimant may require. Claimant underwent the FCE, which was performed on July 29, 2003. Dr. Mills noted that unfortunately there was self-limiting behavior, thereby rendering the results of the FCE invalid.

Claimant was referred by the ALJ to Anthony G.A. Pollock, M.D., a board certified orthopedic surgeon, for an evaluation. Dr. Pollock, in his October 30, 2003 report, stated he was unable to diagnose any preexisting condition, finding no concrete objective evidence of same. He did state in that report that there was "strong evidence that even heavy duty work is not considered a cause of chronic pain, especially when we have failed to reach a diagnosis, all the studies that have been done show minimal pathology and such pathology that is present could certainly be the natural aging process."<sup>1</sup>

Dr. Pollock recommended a bone scan and a sed rate test, both of which were performed and, in Dr. Pollock's opinion, resulted in normal test results. Dr. Pollock stated in his November 11, 2003 letter that this ruled out the presence of a chronic infection or inflammatory process, also indicating that there is no serious pathologic process going on in claimant's back.

Based upon the totality of the medical evidence, the ALJ determined that claimant had failed to show that his ongoing symptoms were related to his employment activities. The Board finds similarly that where it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence,<sup>2</sup> in this instance claimant has failed to satisfy that burden. The medical diagnoses vary considerably, with the causative factors varying as well. The Board, therefore, finds, based upon this record, that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment and the preliminary hearing order of the ALJ should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated August 26, 2004 should be, and is hereby, affirmed.

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<sup>1</sup> P.H. Trans., Resp. Ex. 1 at 2.

<sup>2</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2004.

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BOARD MEMBER

- c:     Roger D. Fincher, Attorney for Claimant  
       Grady Young, Attorney for Claimant  
       William J. Pauzauskie, Attorney for Claimant  
       Gary K. Albin, Attorney for Respondent and its Insurance Carrier (ALEA)  
       Michael D. Streit, Attorney for Respondent and its Insurance Carrier (Liberty)  
       Alan D. Herman, Attorney for Respondent and its Insurance Carrier (Ace American)  
       John D. Clark, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director